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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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NATIONAL ENQUIRER, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

———

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QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments permit a court to prohibit a national newspaper to publish anywhere any information learned in discovery in a libel action concerning nonprivileged subjects, and further prohibit the newspaper to publish any information independently obtained elsewhere from other sources that the court might consider a "fruit" of discovery?

2. May the court further order that if information on the subjects as to which discovery was taken appears in the newspaper, a violation of the order will be presumed, and the newspaper will have the burden of proving that it did not violate the order, even if it cannot do so without disclosing confidential sources?

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, entered in this case on March 9, 1983.[1]

OPINIONS BELOW

The opinion of the Court of Appeal is unreported. It is reproduced in Appendix A, *infra*. The order of the Supreme Court of California denying hearing without

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[1] Parties to the proceeding in the court below are the court named in the caption and real parties in interest Shirley Jones and Marty Ingels. Pursuant to Rule 28.1, Petitioner states that it is a Florida corporation wholly owned by GP Group, Inc., a Delaware corporation that also owns Distribution Services, Inc., a Delaware corporation and Weekly World News, Inc., a Florida corporation. Petitioner has no other affiliates or subsidiaries except wholly owned subsidiaries.

opinion also is unreported; it is reproduced in Appendix B, *infra*. The oral opinion of the Respondent Superior Court of the State of California for the County of Los Angeles is unreported and is reproduced in Appendix C, *infra*. The order issued by that court is reproduced in Appendix D, *infra*.

JURISDICTION

The judgment of the Court of Appeal was entered March 9, 1983. The Supreme Court of California denied a timely petition for hearing on April 13, 1983. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are reproduced in Appendix E, *infra*.

STATEMENT

On January 5, 1983, the Superior Court of the State of California for the County of Los Angeles entered an order of a nature and scope never before seen. It restrained Petitioner, which publishes the National Enquirer, from publishing if it used its discovery rights any story or reference relating to professional entertainers Shirley Jones or Marty Ingels, their relatives or their businesses, whether laudatory or critical, unless Petitioner could present evidence sufficient to overcome the court's presumption that such information had been obtained through discovery in a lawsuit. The penalty for publication and failure to overcome the adverse presumption, the court specified, could be entry of a default judgment against Petitioner in a lawsuit seeking damages from it in the amount of $20,000,000. Having exhausted all other remedies, Petitioner now seeks from this Court relief from this restraint on publication.

The order came about this way. Ms. Jones and her husband Mr. Ingels brought an action for defamation

against Petitioner in Respondent court. *Jones* v. *National Enquirer, Inc.*, No. C-305009, Superior Court, Los Angeles County, California. They sought damages alleged to total $20,000,000 for an article about them that appeared in the October 9, 1979 issue of the Enquirer. The article stated that Mr. Ingels, an entertainer and "celebrity broker," "has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood," and that he "has one of the most notorious casting couches in all of Hollywood." In consequence of his actions, the article went on, Ms. Jones "has been driven to drink by his bizarre behavior." Petitioners' answer denied that the article was false. Mr. Ingels later voluntarily dismissed his complaint. Ms. Jones has continued to prosecute the lawsuit.[2]

In light of the complaint's claim that the article was false, Petitioner served written interrogatories and a request for documents, pursuant to the California Code of Civil Procedure, to establish the truth of elements in the article. Petitioner requested that the plaintiffs identify the names of the employees, celebrity clients, and advertiser clients of his corporation, Ingels, Inc., and any extramarital liaisons. See p. 10a, *infra*. The plaintiffs moved for an order barring Petitioner from any discovery at all, or prohibiting publication of information learned in discovery that the plaintiffs wished to treat as confidential. Petitioner by written response and orally argued that such an order would violate the First and Fourteenth Amendments. The plaintiffs argued that "the law affords no First Amendment protection to the Enquirer from this court's appropriate discovery protective orders." P. 7a, *infra*. The court then announced that

> "I think this is the appropriate time and place for a protective order, at the beginning of court ordered discovery . . . ." P. 13a, *infra*.

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[2] The same lawsuit, on a jurisdictional issue affecting other defendants, is involved in *Calder* v. *Jones*, No. 82-1401, *jurisdiction postponed* (Apr. 18, 1983).

The court expressed concern that "Your client [Petitioner] is a very powerful media source," which it said could use truthful information "as a sledge hammer, to hurt those who seek to bring an action," and that "your client may well end up getting sensitive information about celebrities, very newsworthy information, because of the proper use of the discovery processes." P. 9a, *infra*. The court then declared, after acknowledging that "the protective order does raise significant questions because publication is involved," p. 13a, *infra*, that:

> "I want to make it very clear that at least this court's view is that once the order is issued and information is obtained by the court's processes, including informally after the order is in effect, then the Enquirer would be prohibited from publishing what they learned and the fruits of that, and I think the only way to prevent an abuse of process is to *presume and put the burden on the Enquirer. If they publish a story on the face of it looks like it was led to by discovery in the case, then that is a violation of the court's order unless they demonstrate to the contrary.*" P. 14a, *infra*. (emphasis supplied).

Recognizing the sweeping scope of the ban on publication, the court pointed out that the greater the discovery taken by Petitioner to defend itself, the broader the ban would be:

> "I do want the Enquirer to have an opportunity to ask only as narrow questions as it decides necessary for the purpose of the litigation.
>
> * * * *
>
> "Now, it may be that the Enquirer would prefer not to conduct such broad discovery so that its ability to publish stories it wants to publish is not constrained by it [the order] in this case.
>
> * * * *

> "To the extent that you choose to conduct broad discovery, then the Enquirer will be bound broadly not to publish information it gets in regard to the discovery; and to the extent you choose to conduct narrow discovery, then the constraint will be more narrow, and I want to give you an opportunity to think through your tactics." Pp. 14a-15a, *infra*.

Explaining that it was placing the burden on Petitioner to overcome the presumption that a story was a fruit of discovery, the court acknowledged that Petitioner receives leads for many stories from confidential sources. Nevertheless, said the court, if a story were published based on information Petitioner had obtained independently from confidential sources it chose not to reveal, then proof of non-violation of the order would be Petitioner's problem. "The Enquirer then would have the burden of doing whatever it is going to do to establish independent source . . . ." P. 18a, *infra*.

If Petitioner published a story and failed to produce sufficient proof to overcome the presumption against it, the court warned that the sanctions would be severe:

> "[T]his court would view a violation of the order very, very seriously and would contemplate very drastic sanctions if the court became convinced that the court's process was being abused to unfairly discourage litigation against an important publication . . . .
>
> * * * *
>
> "Of course, it is clear that the one thing that could not happen would be that the Enquirer or any individual reporter would be held in contempt for failing to discover [*sic*—disclose] a confidential source.
>
> "Indeed the sanction—the ultimate sanction that could possibly be imposed for the Enquirer publishing something that appeared to be the fruit of its discovery in this lawsuit in violation of the court's order, the ultimate sanction could be the entering of judgment against the Enquirer in this case." Pp. 14a, 17a, *infra*.

An order accordingly was entered on January 5, 1983, the pertinent portion of which, paragraph 7 (pp. 22a-25a, *infra*), provides that as to any information designated by Ms. Jones and Mr. Ingels as "Confidential Documents or information," [3]

> "No Confidential Document or any information contained therein or discovered as a result of access to Confidential Documents which relates to plaintiffs, their business(es), or their relatives shall be published in any publication owned or controlled by defendant." P. 24a, *infra.*

Further,

> "Upon a showing that defendant has published or caused to be published information described . . . . [above], *it shall be presumed that defendant has violated this order. The burden shall be on defendant to establish* by a preponderance of the evidence *that any such information published* or caused to be published by it *was obtained independently and not as a result of access to* Confidential Documents." Pp. 24a-25a, *infra.* (Emphasis supplied.)

There was no finding or suggestion by the court that any of Petitioner's discovery requests (a request for document production and a set of written interrogatories) were unreasonable in themselves, in light of the issues in the lawsuit. The discovery, the court said, was "proper." P. 9a, *infra.* There was no finding that any information sought was privileged.[4] There was no evidence whatsoever, and no finding, that Petitioner ever had published information obtained through discovery in this case or

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[3] By its terms the order applies to "confidential" information, and then in paragraphs 7(a) and 7(b) defines "confidential" as whatever the plaintiffs choose to designate as confidential. See p. 23a, *infra.*

[4] The plaintiffs' counsel stated to the court that the information "if not strictly within a trade secret or privacy privilege, is sensitive." P. 7a, *infra.*

any other, or used such information to obtain stories. There was no enumeration or specification by the plaintiffs to the court of specifically what information they intended to protect. The order requires simply that the plaintiffs show that information was published on or that "relates to" subjects that they designate confidential. Order, ¶¶ 7(a), (b)(i), pp. 23a-25a, *infra*. The burden then falls to Petitioner to prove that such publication was not a "result" of discovery. Order, ¶ 7(i), pp. 24a-25a, *infra*.

The court did not comment on the First Amendment authorities, including *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), that were cited to it by Petitioner. The court did add that "I would hope that the Enquirer would promptly seek a writ so we can have the parties know at a very early stage whether the Enquirer's arguments would find more favor with the Court of Appeal . . . ." P. 19a, *infra*. As the court recommended, Petitioner sought to have the order vacated by the California Court of Appeal, arguing as it had in the trial court that the order denied rights protected by the First and Fourteenth Amendments. That court denied relief. P. 1a, *infra*. Again asserting violation of First and Fourteenth Amendment rights, Petitioner immediately sought a hearing in the Supreme Court of California. With Justice Mosk and Justice Grodin each asking that their dissents be noted on the record, the Supreme Court of California earlier this month denied hearing. P. 2a, *infra*.

REASONS FOR GRANTING THE WRIT

For nearly four months now Petitioner, a national publishing company, by court order has been unable to defend itself against a $20,000,000 libel claim without becoming subject to a prohibition forbidding it to publish any information concerning Shirley Jones or Marty Ingels, their relatives, or relating to their businesses that might appear even to have been brought to Petitioner's attention by information obtained in discovery. The prohibition applies even to information obtained from and verified by

independent sources, if it was published as a result of access to discovery information. And the burden is on Petitioner to overcome a presumption of guilt.

Restraints on publication in our history, particularly as applied to national periodicals, have been happily rare. This Court has rejected them even against claims of national security, or threat to the judicial process. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976). See also *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Rulings that put the burden on a party to prove its innocence, even outside the First Amendment area, are perhaps even rarer. *Cf. Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). We know of none that has been applied to prohibit the publication of information in a newspaper.

Orders imposed at the discovery stage of litigation seldom come up for review at the appellate level.[5] Yet the lower courts do enter such orders, with little decisional law to guide them. There is an increasing fear that First Amendment rights are being casually restricted in such orders. Commentators observe that the lower courts "have used inconsistent approaches and have reached radically different results." Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 DUKE L.J. 766. Here a publisher defendant has been put to the Hobson's choice of giving up First Amendment rights by not publishing, or giving up other First Amendment rights by taking inadequate discovery in defense of a libel suit. We

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[5] For one instance of such review, *see Herbert* v. *Lando*, 441 U.S. 153 (1979). If Petitioner were to acquiesce in the order and, as the trial court urged, pp. 14a-15a, *infra*, constrict its discovery, it would risk possibly losing a trial because of inadequate preparation. As a practical matter, the discovery ruling never would be reviewed, and the harm would be irreparable.

have been able to find no precedent, reported or unreported, for what happened here. The present case shows a trial court unguided and out of control, a court that perhaps with the best of intentions entered an unsupported order that if allowed to stand would obliterate the First Amendment.

Petitioner is not here to challenge all orders regulating use of discovery. But this particular order lacks factual basis and unlawfully restricts not just discovery, but publication. It is in conflict with landmark decisions of this court, and also if allowed to stand will perpetuate a conflict, as to federal constitutional law applied to national publications, between the nation's largest state and contrary decisions in all the federal circuits and many states. For all these reasons, review is urgent.

I. THE ORDER PROHIBITING PUBLICATION IS IN CONFLICT WITH THE MOST BASIC HOLDINGS OF THIS COURT.

A. The Order Does Not Meet the Extraordinary Requirements To Justify a Prior Restraint on Publication.

There can be no doubt that under some of the most memorable and vital decisions of this Court, the restraint on publication ordered by Respondent is clearly unconstitutional. "[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication." *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

Four years ago in *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97 (1979), this Court, without dissent and speaking through the Chief Justice, held invalid under the First and Fourteenth Amendments a state law requiring court approval before publishing the name of a person charged as a juvenile offender. This Court called the roll of its prior decisions invalidating prior restraints on speech and publication: *Nebraska Press Ass'n* v. *Stuart*, 427 U.S.

539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Near* v. *Minnesota ex rel. Olson*, *supra*. This Court then explained:

> "The resolution of this case does not turn on whether the statutory grant of authority to the juvenile judge to permit publication of the juvenile's name is, in and of itself, a prior restraint. First Amendment protection reaches beyond prior restraints . . . .
>
> "Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases." 443 U.S. at 101-102.

Similarly in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), this Court emphatically held that the same constitutional provisions were violated by a state law prohibiting publication of confidential proceedings of a judicial review commission.[6]

Just a month ago, in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 51 U.S.L. Week 4315 (U.S. Mar. 29, 1983), this Court pointed out that although many First Amendment issues are open to disagreement, prior restraints are not in the doubtful category:

> "But when we do have evidence that a particular law would have offended the Framers, we have not

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[6] "*Any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 317 (1980), *quoting Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963) (emphasis added by the Court). See also *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Healy* v. *James*, 408 U.S. 169, 184 (1972).

> hesitated to invalidate it on that ground alone. Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect. *Near* v. *Minnesota*, 283 U.S. 697, 713, 716-718 (1931); cf. *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233 (1936) . . . ." 51 U.S.L. Week at 4317 n.6.[7]

Even assuming some restriction on discussion or use of some information obtained in discovery might on a proper and precise factual showing of need be permitted, the record here supports no such restriction, and the broad restriction on publication is not an acceptable solution. *Cf. New York Times Co.* v. *United States, supra*, 403 U.S. at 733 (White, J., concurring). Court orders restricting communications "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 101 (1981) (footnote omitted). They must be based on "individualized determinations" that are "articulated in findings." *Globe Newspaper Co.* v. *Superior Court*, 102 S.Ct. 2613, 2621 n.20 (1982).

The order here is based on no findings whatsoever and no evidence whatsoever. It was entered almost casually, along with an invitation to try for relief on appeal. If *Smith* v. *Daily Mail Pub. Co., supra*, *Landmark Communications, Inc.* v. *Virginia, supra*, and *Near* v. *Minnesota ex rel. Olson, supra*, are the law, then this order cannot stand.[8]

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[7] The rare instances in which this Court ever has tolerated prior restraints on publication virtually all have been in the context of military discipline and military security. *Cf. Brown* v. *Glines*, 444 U.S. 348 (1980); *Secretary of the Navy* v. *Huff*, 444 U.S. 453 (1980).

[8] The fact that the order applies to information involved in discovery is not enough to justify such a prior restraint. In *New York Times Co.* v. *United States, supra*, the information was stolen, was under national security classification, and was allegedly vital to the security of the country, but this Court held that a prior restraint violated the First Amendment.

B. Presuming a Violation and Placing the Burden of Proof of Innocence on the Publisher Violate the First Amendment and Deny Due Process.

The Order here provides in paragraph (7)(i) that "[t]he burden shall be *on defendant* to establish by a preponderance of the evidence that any such information published or caused to be published by it was obtained independently and not as a result of access to Confidential Documents." (Emphasis supplied.) As the court explained its purpose: "If [Petitioner] publish[es] a story *on the face of it looks like* it was led to by discovery in the case, then that is a violation of the Court's order *unless they demonstrate to the contrary.*" P. 14a, *infra* (emphasis supplied).

Such a shifting of the burden, onto the publisher to prove its right to publish, is not compatible with the Constitution.

> "A court may not impose a restraint that sweeps so broadly and then require those who would speak freely to justify special treatment by carrying the burden of showing good cause." *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982).

When the court seeks to separate legitimate from illegitimate speech and to punish the latter, "where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). This Court has held repeatedly that due process prohibits placing on a speaker or publisher the burden of proving a negative, that his speech is not illegitimate. *Speiser* v. *Randall*, *supra*; *First Unitarian Church* v. *County of Los Angeles*, 357 U.S. 545 (1958). Although the states generally may regulate the allocation of the burden of proof, they may not do so "in a manner tending to cause even a self-imposed restriction of free expression." *Smith* v. *California*, 361 U.S. 147, 151 (1959). "[W]hen First Amendment values are implicated, the selection of a standard of proof of necessity implicates the relative *constitutional* acceptability of erroneous

judgments." *McKinney* v. *Alabama*, 424 U.S. 669, 684 (1976) (Brennan, J., concurring) (emphasis in original). *Cf. Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Blount* v. *Rizzi*, 400 U.S. 410, 418 (1971).

At issue in *Speiser* v. *Randall*, *supra*, were tax exemptions conditioned on the signing of an oath that the claimant did not advocate the unlawful overthrow of the government. This Court held that, although due process did not require the full formalities of a trial, it did require at a minimum that the state bear the burden of persuasion for denial of a benefit "where the transcendant value of speech is involved." 357 U.S. at 526. To shift the burden to a party subject to penalty—in this case, Petitioner—is predictably to chill legitimate expression:

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." *Ibid.*

The order here holds over petitioner's head the threat of a $20,000,000 default judgment should it publish any information produced by plaintiffs in discovery, or, beyond that, any information that might look as if discovery had provided the idea. The practical result of shifting the burden is to force petitioner to steer wide of the vast unlawful zone created by the order, by publishing nothing on discoverable subjects at all.

Indeed, that deterrence is even greater in this case than in *Speiser*. There legitimate speech was chilled only to the extent that the claimants took into account the possibility of mistaken factfinding. Petitioner, however, must also take into account that to prove that a story about plaintiffs was not a result of discovery may be impossible without disclosing confidential sources. Petitioner's readers are interested in the entertainment industry. Petitioner publishes many stories about entertainers, including the plaintiffs, some of them based upon confidential sources. Such sources, of course, enjoy a qualified First Amendment privilege. *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (the privilege "is no longer in doubt"). Shifting the burden of proof thus compels petitioner to sacrifice one First Amendment right or another—(1) it can publish a story about plaintiffs based on independent information from a confidential source, but only at the cost of revealing the source in order to sustain its burden of proof; or (2) it can decide not to publish the story to protect the confidentiality of its source, even though the story is not based on information obtained in discovery and is not in violation of the order.

Where the "transcendent value of speech is involved," 357 U.S. at 526, however, the First Amendment and due process do not permit such a Hobson's choice. The constitutional violation is clear-cut; the order cannot stand.

C. The Order Is Unconstitutionally Overbroad and Fails to Employ Less Drastic Alternatives.

This Court often has held that even when a legitimate interest exists in having some narrow restraint, the First Amendment is violated when speech and press are chilled by overly broad restrictions that fail to consider less drastic alternatives. See, *e.g.*, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *NAACP* v. *Button*, 371 U.S. 415 (1963). Particularly when restraints on a newspaper are concerned,

> "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.* v. *Superior Court, supra*, 102 S.Ct. at 2620.

If any restrictions on speech in the course of litigation are tolerated, they must be based on careful findings and "should result in a carefully drawn order that limits speech as little as possible." *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 102 (1981). Where less restrictive alternatives are available, they should be adopted. *Cf. Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring). Just ten days ago, this Court had occasion to reiterate that

> "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn* v. *Blumstein*, 405 U.S., at 343. . . . If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson* v. *Celebrezze*, 51 U.S.L. Week 4375, 4382 (U.S. Apr. 19, 1983), *quoting Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973).

In the courtroom setting as elsewhere, prior restraints have been "roundly condemned," and this Court has "admonished trial courts to employ their usually considerable discretion to search for other alternatives than prior restraints." *KPNX Broadcasting Co.* v. *Arizona Superior Court*, 103 S.Ct. 584, 587 (1982) (Rehnquist, J., in chambers).

By sweeping into its prohibition all future stories about the plaintiffs, their relatives, or matters connected with Mr. Ingels' "celebrity broker" business, the order widely bans discussion of topics of public interest. The plaintiffs are newsworthy public figures who are frequently written about in the Enquirer and in many other peri-

odicals as well. The record in the Superior Court contains at least 17 articles published by Petitioner about the plaintiffs and their relatives (who also are entertainers) prior to entry of the order, and in fact there have been dozens more. By prohibiting in addition articles about Mr. Ingels' business, the order cuts an even wider sweep, for the record shows that Mr. Ingels claimed at one point to have 24 employees and 139 clients, many of them celebrities. Presumably the order applies to publishing anything about any of them, unless petitioner is prepared to prove that each story did not "result," p. 25a, *infra*, even in some unspecified indirect way, from discovery.[9]

D. The Order Imposes an Unconstitutional Condition.

This Court has held repeatedly, and particularly where First Amendment freedoms are at stake, that a state normally cannot condition access to a benefit on the surrender of constitutionally protected rights. *See, e.g., Branti* v. *Finkel*, 445 U.S. 507 (1980); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977). As this Court held in *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), a state

> "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in

[9] The order itself is intolerably vague in its failure to define "fruit" or "result," and in delegating to the plaintiffs with no clear standards the choice as to what information is covered and what "relates to" plaintiffs on their businesses. Moreover, the order unconstitutionally singles out Petitioner for its prohibition; the information related to discovery if obtained could be published by anyone—except Petitioner. *Cf. Police Dep't* v. *Mosley*, 408 U.S. 92, 96-98 (1972). Because of such discrimination, it can be said that to some degree the order "largely fails to achieve its purpose." *Smith* v. *Daily Mail Pub. Co., supra*, 443 U.S. at 110 (Rehnquist, J., concurring; footnote omitted).

> effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible."

California liberally grants to defendants the right to discovery of relevant information—in this case, information tending to establish the truth of the story that the plaintiffs had put at issue. There was no suggestion by the court that the information sought by discovery was not relevant or that it was privileged, and indeed it referred to Petitioner's requests as "proper." P. 9a, *infra*.

Yet the court held that if Petitioner wanted to use the statutorily available discovery in aid of its defense, it would have to give up its First Amendment right to publish (1) anything it learned in discovery; (2) anything it learned from contacting other sources that might be characterized by the court for unspecified reasons as a "fruit" of discovery; and even (3) anything it learned totally independently and not as a result of discovery, unless it was able to overcome an adverse presumption and prove, by disclosure of confidential sources if necessary, that the origin of the story was elsewhere. Recognizing how onerous these conditions were, the court urged Petitioner to limit its discovery in defense of the libel suit narrowly, because the court said, the greater the discovery, the greater the restriction on publication. Pp. 14a-15a, *infra*. Indeed, the condition imposed here was not just a court-directed trade-off between First Amendment rights on the one hand and discovery rights on the other. It was a direction that First Amendment rights (of a publisher to defend a defamation suit with a defense of truth) be given up in order to exercise other First Amendment rights (to publish).

The importance of discovery rights as a protection for a publisher is graphically illustrated by this very case. After his filing a verified complaint that the original

story was in all respects false, Mr. Ingels without explanation and on the eve of his deposition voluntarily dropped his suit against Petitioner.[10] Vigorous discovery, like the free market of ideas, is an aid to finding and protecting the truth.[11]

II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS.

A. Publication of Nonprivileged Information Cannot Be Prohibited on the Record Here.

In *Gulf Oil Co.* v. *Bernard*, *supra*, 452 U.S. at 102 n. 16, this Court cited with approval and quoted from the leading case of *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). In that decision the U.S. Court of Appeals for the District of Columbia Circuit held that an order that prohibited extrajudicial disclosure of information obtained through discovery, but was unsupported by findings and evidence and "a particular and specific demonstration of fact" was invalid under the First Amendment. "Generally speaking, when a party obtains documents or information through the discovery process, he can 'use that information in any way which the law permits.'" 598 F.2d at 188, *quoting Leonia Amusement Corp.* v. *Loew's, Inc.*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955).[12]

In the Respondent court, Petitioner argued that to grant the sweeping order imposed here would be contrary to *In re Halkin* and other cases. The plaintiffs argued in reply that *In re Halkin* was wrongly decided. The court never discussed *In re Halkin*, or the other cases cited to it, at all.

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[10] The same factual issues remain in the suit by Ms. Jones.

[11] Indeed, this Court has recognized the propriety of discovery as well as of careful and narrow limitations on it when the press is the party producing. *Herbert* v. *Lando*, 441 U.S. 153 (1979).

[12] *Halkin* has been described as "the first decision to formulate a useful standard for determining whether a protective order is constitutional." Comment, 1980 DUKE L. J. 766, *supra*.

The decision below conflicts with the holding of the District of Columbia Circuit in *In re Halkin*; with the holding of the First Circuit in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); and with the holding of the Sixth Circuit in *National Polymer Products, Inc.* v. *Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981), in which the court of appeals said:

> "The principle that parties do not lose their First Amendment rights by virtue of their participation in legal processes extends to information obtained in discovery as well as that obtained from the public record." 641 F.2d at 423.

And it is widely recognized and held that the burden of showing necessity for an order restricting use of discovery materials is very high, indeed. *E.g.*, *New York Press Pub. Co.* v. *McGraw-Hill Pub. Co.*, 64 App. Div. 2d 962, 409 N.Y.S. 2d 39, opinion at 4 Media L.Rptr. 1819 (1978).

B. There Is a Conflict as to Whether Publication of Information Established from Independent Sources Can Be Restricted.

Even courts that have recognized that in rare circumstances and on adequate evidence, dissemination of narrowly specified information obtained in discovery may be subject to appropriate restrictions, have never gone the further step that the court here took, and prohibited publication of information obtained and verified from *independent sources*, if the idea might appear to have been a "fruit" p. 14a, *infra*, or a "result," p. 25a, *infra*, of discovery. Such an order is grossly improper, and cannot be reconciled with the careful and cautious reasoning of *In re Halkin*, *supra*, and the cases following it.

C. There Is a Conflict With Federal Court of Appeals and State Decisions Because the Order Effectively Denies the Right to Protect Confidential Sources.

The order, as previously noted, penalizes Petitioner for use of confidential sources. True, said the court, it

would not formally require confidential sources to be disclosed. P. 17a, *infra*. But if Petitioner published a story within the terms of the order based on a confidential source, and could not prove its independent origin except by revealing that source, then the dilemma would be Petitioner's problem. P. 18a, *infra*.

The court's unprecedented procedure requires either (1) nonpublication of information learned from a confidential source, or (2) disclosure of the source, or (3) "very drastic" penalties, p. 14a, *infra*, including the possibility of a $20,000,000 default judgment. P. 17a, *infra*. Although confidential news sources may not enjoy an absolute privilege from disclosure, *cf. Branzburg* v. *Hayes*, *supra*, that they do have a substantial First Amendment privilege is well established. The order here effectively destroys that protection, and therefore is in conflict with the decisions of many courts that have recognized it—which include courts in *all twelve* numbered federal circuits.[13]

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[13] See, *e.g.*, *Zerilli* v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.), *cert. denied*, 103 S.Ct. 215 (1982); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *United States* v. *Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Gilbert* v. *Allied Chemical Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Schultz* v. *Readers Digest Ass'n*, 468 F. Supp. 551 (E.D. Mich. 1979); *Gulliver's Periodicals, Ltd.* v. *Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *DeRoburt* v. *Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981); *Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 89 F.R.D. 489 (C.D. Cal. 1981); *Silkwood* v. *Kerr-McGee Corp.*, *supra*. The Eleventh Circuit has stated that it will be bound by the precedent of the Fifth Circuit. *Bonner* v. *City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981).

The privilege has also been recognized in numerous state courts. *Senear* v. *Daily Journal-American*, 27 Wash. App. 454, 618 P.2d

III. THE ISSUE IS OF FUNDAMENTAL IMPORTANCE, AND THE CIRCUMSTANCES CALL FOR SUMMARY REVERSAL.

This order restraining publication has been in effect now for four months, during which time Petitioner has brought this action to challenge it and has sought relief in two layers of appellate courts, exhausting all remedies available in the courts of California. Promptly upon learning of the California Supreme Court's divided denial of hearing, Petitioner has brought the case here.

This Court is nearing the end of its current Term. A grant of certiorari by itself would mean argument sometime in the fall of 1983 and a decision perhaps at the end of this year at the earliest. By that time the four-month duration of the present restraint would have tripled.

In *Oklahoma Pub. Co.* v. *District Court*, 430 U.S. 308 (1977), a trial court entered an order prohibiting a newspaper from publishing certain information. Citing *Nebraska Press Ass'n* v. *Stuart*, *supra*, and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court in a unanimous order granted certiorari and reversed. In other instances of prior restraint on the press, this Court has adjudicated with dispatch. See, *e.g.*, *New York Times Co.* v. *United States*, *supra*. In many contexts, where a lower court has acted with no basis for its action and contrary to the clear precedents of this Court, reversal often accompanies grant of certiorari. See, *e.g.*, *Tague* v. *Louisiana*, 444 U.S. 469 (1980); *Hanrahan* v.

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536 (1980), *aff'd*, 97 Wash. 2d 148, 641 P.2d 1180 (1982); *Greenleigh Associates* v. *New York Post Corp.*, 79 App. Div. 2d 588, 434 N.Y.S.2d 388 (1980); *Connecticut State Board* v. *Fagin*, 33 Conn. Supp. 204, 370 A.2d 1095 (1976); *Morgan* v. *State*, 337 So.2d 951 (Fla. 1976); *Brown* v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Ia. 1977), *cert. denied*, 436 U.S. 905 (1978); *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974).

Hampton, 446 U.S. 754 (1980); *Douglas* v. *Buder*, 412 U.S. 430 (1973). Such dispositions have been used to correct immediately denials of First Amendment rights. See, *e.g.*, *Norwell* v. *City of Cincinnati*, 414 U.S. 14 (1973); *Hartstein* v. *Missouri*, 404 U.S. 988 (1971); *Wiener* v. *California*, 404 U.S. 988 (1971); *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636, 637 (1968) ("The procedure . . . fell short of constitutional requirements demanding necessary sensitivity to freedom of expression").[14]

There is no need for delay in this case. The order here is without evidentiary basis, is misconceived and goes too far. This Court's prior holdings are familiar, and they are clearly controlling. The judgment below should be reversed now.

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[14] Although Mr. Justice Marshall and sometimes other members of the Court have expressed concern about summary dispositions, he has recognized their propriety in cases "in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error." *Wyrick* v. *Fields*, 103 S.Ct. 394, 397 (1982) (Marshall, J., dissenting) (footnote omitted); see also *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Those criteria are more than met here, and the need to adjudicate prior restraints on publication swiftly was emphasized by several members of this Court in *New York Times Co.* v. *United States*, *supra*. See 403 U.S. at 714 (Black, J., concurring) ("should have been vacated without oral argument when the cases were first presented to this Court"); *id.* at 725-726 (Brennan, J. concurring) ("First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result") (footnote omitted); *id.* at 733 (White, J., concurring) ("the Government mistakenly chose to proceed by injunction"); *id.* at 748-749 (Burger, C.J., dissenting) ("The prompt setting of these cases reflects our universal abhorrence of prior restraint"). Moreover, Respondent and the real parties in interest below are on notice from this petition that immediate reversal is sought.

CONCLUSION

For the reasons stated, certiorari should be granted, the judgment vacated, and the case remanded with instructions to vacate the order of the Superior Court.

Respectfully submitted,

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April 29, 1983

APPENDIX A

Opinion and Judgment of the California Court of Appeal, Second Appellate District

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

2d Civ. No. 67772

(L.A. Super. Ct. No. C 305009)
(Eli Chernow, Judge)

NATIONAL ENQUIRER, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent,

SHIRLEY JONES and MARTY INGELS,
Real Parties in Interest.

[Filed Mar. 9, 1983]

ORDER

THE COURT: *

The petition for writ of mandate filed February 9, 1983, and the preliminary opposition thereto filed February 14, 1983, have been considered. The petition is denied for absence of facts showing petitioner is entitled to extraordinary relief.

/s/ Woods

/s/ Kingsley

/s/ Amerian

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* WOODS, P.J., KINGSLEY, J., AMERIAN, J.

APPENDIX B

Order of the Supreme Court of California

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

Apr 13, 1983

I have this day filed Order

HEARING DENIED

Mosk, J
Grodin, J OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: 2d Civ. No. 67772

NATIONAL ENQUIRER, INC.

vs.

SHIRLEY JONES and MARTY INGELS

Respectfully,

Clerk

APPENDIX C

Oral Opinion of the Superior Court of the State of California for the County of Los Angeles (From Transcript of Proceedings, October 25, 1982)*

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 80 HON. ELI CHERNOW, JUDGE

No. C 305 009

SHIRLEY JONES, et al.,
Plaintiff,

vs.

NATIONAL ENQUIRER, INC., et al.,
Defendant.

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[1] LOS ANGELES, CALIFORNIA;
MONDAY, OCTOBER 25, 1982;
10:00 A.M.

* * *

THE COURT: Shirley Jones versus National Enquirer.

Counsel, state your appearances.

MR. HEARD: F. Lane Heard, for the Enquirer.

MR. ABLON: Paul S. Albon of Hayes & Hume for the plaintiff.

MR. LANGBERG: Berry Langberg from Hayes and Hume for the plaintiffs.

THE COURT: Who is going to argue?

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* Spelling of Mr. Ingels' name has been corrected throughout.

MR. ABLON: I will, Your Honor.

THE COURT: We will reserve the remaining source issue for the last.

Who wants to be heard?

MR. HEARD: Your Honor, I would take up the question of our interrogatories and production request. I understand Your Honor is concerned about the overbreadth. Let me direct my comment, then, to several interrogatories and the production requests about which I think are not reasonably requested with specificity. In fact, I believe those are the interrogatories and the production requests to which we directed almost all of our argument and to which most of this mountain of paper is attributable, and those are the interrogatories which ask the plaintiffs to identify the former and present employees, to identify the celebrities that have been retained in transactions, and to identify the client advertisers who have come to Mr. Ingels and requested him to put together these [2] transactions. It is to those three groups of people we have directed most of our argument.

THE COURT: Even those, aren't they unlimited as to time.

MR. HEARD: As we pointed out, they are on their face, but all of these questions go to Mr. Ingels' business, and this business is only five years old. It only goes back to '77, which is two years prior to the date of the article, so we are dealing with a confined time period by the very nature of the request which goes to his business.

Second of all, Your Honor, the allegations of complaint are not limited simply to the period '77 to '79—that is the beginning of his business—until the date of production. These allegations question not only the accuracy of the article as it relates to his past behavior as pre-79. These allegations also go to the implications of those statements in the article, implications which they have spelled out in the most recent answers to interrogatories. Preliminary indication which they said suggest Mr. Ingels has never cheated any stars, never cheated any client,

never cheated any employees. This also bears not only on the truth but with the reputation which is in the lawsuit.

THE COURT: Do employees, advertisers and celebrities and what else—

MR. HEARD: Those are the three categories of individuals who we are asking the plaintiffs to identify. There are two requests for production of documents which also raise questions of overbreadth. The first is the request for documents that go to complaints made by employees against Ingels Inc. or Marty [3] Ingels. The second is a request for complaints made by client advertisers against Mr. Ingels. A third somewhat unrelated in terms of subject matter but also not overbroad which request production of documents as to interviews given by the plaintiffs which relates to the defendants, the Enquirer or the subject article.

We would be happy to address those interrogatories and production requests as to the merits of whether we are entitled to production. We don't think those particular interrogatories and production requests raise any real question as to overbreadth. As a matter of fact the plaintiffs have answered one production request along those lines and that is production request Number 6 which calls for the production of documents relating to the the American Lutheran Church transaction.

THE COURT: If we deal with those, we then sustain the other objections—in other words, what you can try to work out a more general narrow agreement or we can deal with those, however we are going to deal with them and then the result—the implication of that is the objection would be sustained to the others and then you have to start on the other subjects of inquiry.

MR. HEARD: Well, so much time and so much paper has been devoted to this question of celebrities, clients and employees, and whether there is some overarching trade secret which tries overreaching over the right of privacy. I think it would be well to dispose of that ques-

tion because it may permeate other production requests in the future. It has been amply briefed. [4] We would like to resolve that. We think it an improper transaction, that is, trade secret.

THE COURT: Mr. Ablon?

MR. ABLON: In respect to the three categories, I think this court's ruling at most for a protective order may in fact obviate so much concern, which maybe is [sic—is not] to say we don't think these matters are privileged any longer but that question may become moot if adequate production [sic—protection] is provided for the plaintiff.

Despite that, however, we still feel there is overbreadth when a question asks for all employees at all times. The fact that an article in 1979 claimed or suggested that Mr. Ingels was or did certain things we don't feel opens up the entire list of his employees and customers for all time.

With respect to his client, that is, the people who come to him seek celebrity talent, we have the same problem. I don't think that any request for anyone who has every come to him for any such information are limited. If it were more limited in light of a protective orders, we would be inclined to go along with it. For example, if it were limited in terms of time up until the time of the article and asked for advertisers for whom there were problems of a particular type—for example, counsel has indicated that they seek all complaints by customers to Mr. Ingels. That would include complaints Mr. Ingels didn't do something quickly.

That is the ordinary day-to-day complaint lawyers get from their clients and anyone who has clients gets from the people with whom they are dealing to the kind of problems that [5] are suggested by this article, which I think are a thrott [*sic*] different ilk, and I think a limitation limiting along those lines would be necessary.

I would be glad, for this court's convenience and to try and facilitate matters, if after we have discussed the protective order situation to go out with counsel and in

light of the protective order see if we can agree on some more appropriate limitation to the questions; however, I think as the questions now stand they are just overbroad.

THE COURT: Let's talk about the protective order, Mr. Ablon.

MR. ABLON: Your Honor, again it is our position that much of the information that is sought here is very private and, certainly, if not strictly within a trade secret or privacy privilege, is sensitive. Seeking the list of clients of Mr. Ingels' business, seeking information with respect to Mr. Ingels' sexual activities—which again we don't deny has some relevance in more limited context to initiate this lawsuit—I would think this discovery does not meet that relevance.

In light of this, it is basically our position that the law affords no First Amendment protection to the Enquirer from this court's appropriate discovery protective orders, and we would, along the lines as the court suggested in his tentative ruling, be inclined to go along with that kind of a protective order so long as there was a clear indication that—one problem we have, for example, is that the defendant is a corporation, and we would certainly like to see something in the order that would limit the persons within that corporation who [6] would have access to that material as opposed to just limiting access to the parties themselves. Obviously the more people who have their ears and eyes in tune with this material, the more chance there is that the material might get out.

I think we would also like some type, to the extent the court is able to fashion the type of relief, some type of relief that any fruit of the tainted material, so to speak, would also be in the purview of the protected order—that is, if the information obtained let to get other information, the other information would also be subject to the same limitation, and within those param-

eters we would be inclined to go along with Your Honor's tentative ruling.

THE COURT: Mr. Heard?

MR. HEARD: Your Honor, let me try to restate the basis for our objection. We are not simply being litigious in opposing this motion for protective order. It is apart from any First Amendment requirement.

Clearly there has to be some good cause shown for a protective order, and if we focus on these interrogatories and production requests we just mentioned—identification of employees, celebrities, clients—we think there is really no adequate showing that this is the kind of information which is entitled to be protected because it is within the realm of privacy or because it is a trade secret, and that is our basis for opposing a protective order as to that material.

Frankly, we don't even understand what Mr. Ablon is talking about when he wants to say that is the kind of material he wants protected and he wants the fruit of that material [7] protected. We don't want to belabor the point, but there are very specific legal arguments we think are to be addressed that point out we are not talking about trade secrets here, and the right of privacy is not an overarching privilege which protects commercial transactions, which protect the fact of one's employment, protects the fact celebrities contract with Mr. Ingels or a client can contract with Mr. Ingels in one historic transaction. There is sensitive, personal information that we have asked for, but it does not permeate these discovery requests.

There are three interrogatories that ask for personal information, and that is the interrogatory that bears on his sexual activities and any photographs that he may have asked to be made. Those interrogatories belong in a separate category, but the bulk of this discovery goes to his business and the transactions he has entered into, and the right of privacy simply doesn't protect that kind of information. It is directed to an entirely different part.

Government snooping and surveillance and collection of material from individuals by employers and government, that is not involved and it doesn't provide a basis for a protective order. That it is a trade secret, that is a little bit trickier question, but if you look at Mr. Ingels' two declarations, Your Honor, they describe his business in the following way: He has a competitive advantage, to be sure, but it is not an advantage that depends upon trade secret.

His advantage is he is a celebrity and he has friends who are celebrities and he can call them up directly and [8] put a business proposition to them, and that is an advantage he has over anybody else in the business, and his wife is herself a celebrity. That is the advantage he has. There is no trade secret, no identifying advertisers who want to use celebrities to commercialize this property. There is no trade secret with celebrities available.

THE COURT: There is another problem you haven't addressed, and that is clearly on the surface of this case. Your client is a very powerful media source which published an article that is clearly damaging to the plaintiffs in this case, that they exercised their right to litigate. As a result of that, then they are compelled to provide information to your client, and your client may well end up getting sensitive information about celebrities, very newsworthy information, because of the proper use of the discovery processes.

That information, however, is plainly subject to misuse and abuse that plainly is subject to the use, as a sledge hammer, to hurt those who seek to bring an action against a powerful publication or those who would seek to help people in that situation and that those people who have obligations to provide truthful information may find themselves on the front page of the Enquirer if there isn't a protective order.

MR. HEARD: But, Your Honor, I understand that potential and the concern that the plaintiffs reasonably have. But the question I have in response is: Given the

interrogatories we have put to them at this time and the requests we have put to them now, do those requests and interrogatories give good cause for a protective order?

[9] We haven't ask for any sensitive information about celebrities. We have asked who they are and who has he done business within the past. We have asked who the clients are who have come to him. It is difficult to understand what is sensitive about having knowledge an advertiser such as Canada Dry comes to him and what the Enquirer could say about this, assuming there is that potential, but we haven't asked for anything but the identification.

The same thing is true of the employees. We have asked for identification. The fact of their employment isn't something exploitable as a story. There is really only the one category of information which gives rise to legitimate concern, and that is about his sexual activity, photographers and, granted, as we have said in our papers, that is a different problem.

THE COURT: But surely you plan to use that information if you get it to ask some further questions.

MR. HEARD: We will indeed. We will want to depose, I am sure, employees, clients, and celebrities to find out what the nature of their transaction was, and we will be asking when they worked for them and what they were paid.

THE COURT: You are using the legal process to get the first step so you can proceed to get the sensitive information through the legal process.

MR. HEARD: I am still not willing to concede where this leads us is to sensitive information, but surely the information we have sought now is not of that type and doesn't justify a protective order, and we are concerned about the precedence this [10] sets as far as what the plaintiffs in the future are going to claim is within the right of privacy, whether they are going to continue to

assert that as a ground for withholding information about commercial transactions.

We are quite truthfully flabbergasted one would say a commercial transaction involves the right of privacy of the parties to that transaction. that when we are talking about a contract that was entered into, we are not entitled to find out the parties to this transaction were and what the outlays of the deal were, how much each side was to be paid, and that is the assertion that has been made and the objection raised to our interrogatories. We don't want to have to meet that repeatedly—

THE COURT: What was the Enquirer article about if it wasn't about a commercial transaction?

MR. HEARD: I am not sure I follow Your Honor's question.

THE COURT: Everything said about Mr. Ingels was about his conduct in the context of a commercial transaction?

MR. HEARD: Yes, indeed. Yes, indeed, Your Honor. It said, for instance, he cheated his clients and he cheated the celebrities and he cheated them with regard to deals he put together and brokered, but any more than this is a right to privacy.

On the part of General Motors, if it was claimed it swindled a European subsidiary it had, and yet we don't think the contract of the swindle involve sensitive and personal information? It is a transaction in the marketplace, and it is not something that is private. It essentially is not—

[11] THE COURT: Mr. Ablon, you may respond.

MR. LANGBERG: May I make one comment on this point?

THE COURT: No. Mr. Ablon will argue it.

MR. ABLON: Your Honor, I guess our law firm has had the benefit of representing other plaintiffs against National Enquirer, and when I say "benefit," I mean in terms of seeing the practices of the Enquirer in other contexts. We have seen, for example, in the Carol Bur-

net case, Your Honor, that merely the presence of two celebrities at a location in Washington D.C. was a basis of a fabricated story. The creation of events in trial, there was no corroboration for it at all.

The point being though, Your Honor, is that first, I think the details of a financial transaction between Mr. Ingels' client that comes to him and says, "I want to purchase celebrity talent for X amount of dollars," is not something inherently within the realm of public information. As I understand what is within the realm, it is to anything that is expectation of privacy.

We believe commercial transactions, particularly where you are dealing not only with Mr. Ingels' rights but the rights of people who come to him with budgets and other information which they may not want made public with respect to these transactions, are also involved.

I have also been advised by Mr. Ingels the contracts which were entered specifically have a confidentiality provision, and though I have not informed the court, I would be glad to supplement the record with a supplemental declaration to that effect, certainly, and present the other end of that [12] transaction that Mr. Ingels entered into with a celebrity.

Celebrities are well known to like no figures and amounts of money they receive in terms of their dealings to be made public information. I also would say that the fact that Mr. Ingels is a celebrity himself does not, I think, preclude him from claiming that he has some right of confidentiality and privacy with respect to his transaction.

I think his declaration makes clear who uses his kind of service which is not all people seeking celebrities is in and of itself an asset, an important part of his assets. As I understand trade secrets, anything that gives you that competitive advantage that assists you in the marketplace can come within the rubric and be subject to the court's protection.

THE COURT: Briefly, Mr. Heard.

MR. HEARD: I will be very brief, Your Honor.

I think there is basic confusion about what the legal standard is. The standard for invoking the right of privacy is not that the person have an expectation of privacy, it is it be involved with personal matter which if exposed to publicity would be highly offensive or objectionable. If the standard were simply there was an expectation of privacy, there would be no commercial litigation in the courts in which a protective order wasn't appropriate for the whole scope of the business information produced as a matter of course.

Likewise, the standard for trade secrets is not just anything that gives competitive advantage; it must be secret and something used in the continuous course of the business. My basic problem here is the legal standard which Mr. [13] Ablon has relied on is inaccurate. I would be happy to cite the cases, but I know the court has read them. I think he is simply wrong.

THE COURT: I am not sure expectation of privacy is enough, but I think the California right of privacy is broader than the more general rights that exist in the country.

In any event, I think this is the appropriate time and place for a protective order, at the beginning of court ordered discovery, that I certainly anticipate that the parties will be able to resolve a number of their disputes, and they should have as a background for that resolution the protective order.

The protective order does raise significant questions because publication is involved on both sides of it. That one has to balance the danger of a restraint on a publication against the danger of an abuse of the power of that publication to unfairly prejudice the rights of litigants to come to court to seek redress for an alleged wrong.

I think the plaintiffs are quite correct in seeking an order that would prevent the publication of information

that is the fruit of that information. I think the Enquirer should have fair notice of that so that they can narrow the scope of what they are seeking through the court's process if they so chose. In other words, we have —the Enquirer asked a series of questions. Maybe the Enquirer is planning a story tomorrow on celebrities dealing with Marty Ingels that they may have gathered everything they plan to publish in that story already.

[14] I want to make it very clear that at least this court's view is that once the order is issued and information is obtained by the court's processes, including informally after the order is in effect, then the Enquirer would be prohibited from publishing what they learned and the fruits of that, and I think the only way to prevent an abuse of process is to presume and put the burden on the Enquirer. If they publish a story on the face of it looks like it was led to by discovery in the case, then that is a violation of the court's order unless they demonstrate to the contrary.

Moreover, because of the potential for an abuse is so great, at least this court would view a violation of the order very, very seriously and would contemplate very drastic sanctions if the court became convinced that the court's process was being abused to unfairly discourage litigation against an important publication; so I do want the Enquirer to have an opportunity to ask only as narrow questions as it decides necessary for the purpose of the litigation.

Do you understand what I am saying.

MR. HEARD: I don't understand, frankly. That refers to asking narrow questions?

THE COURT: Because the Enquirer will be prohibited from publishing information it gets to some of these questions—Ordinarily, if you didn't have that constraint, the lawyer usually prefers to ask as broad a question in discovery as possible. The strategy of the questions that have been asked, asking for everybody that Mr. Marty Ingels slept with whenever, has it any

relation to the article or any limitation on time? [15] Now, it may be that the Enquirer would prefer not to conduct such broad discovery so that its ability to publish stories it wants to publish is not constrained by it in this case.

MR. HEARD: May I respond, Your Honor?

THE COURT: Sure.

MR. HEARD: To take the example Your Honor has just mentioned, the breadth of the discovery that has been asked for asking for all employees or asking for all sexual activities, Your Honor, it seems to me—I stand ready to be corrected—that is exactly as necessitated by the allegations in this case.

THE COURT: No, that is not correct.

MR. HEARD: Well, Your Honor, when Mr. Ingels alleges he never cheated employees, then it is difficulty to narrow a request and say our concern should only be with those employees, say, for a two-year period from '77 to '79. If he says, as he did in his Answers to Interrogatories, that there is an implication he has been unfaithful to his wife, how do we meet that allegation without asking the broad question, whether he has ever been? They listed roughly six to seven pages of what they have read to be direct statements in the article or implication or inferences of the article, all of which they say is false. We have to meet each of the implications.

THE COURT: Mr. Heard, you may have ultimately concluded that the appropriate litigation that is to take place is to conduct—at least initially—to conduct as broad a discovery as possible. That is open.

MR. HEARD: I understand what Your Honor is saying what the penalty is.

[16] THE COURT: No. To the extent that you chose to conduct broad discovery, the the Enquirer will be bound broadly not to publish information it gets in regard to the discovery; and to the extent you chose to conduct narrow discovery, then the constraint will be more narrow, and I want to give you an opportunity to

think through your tactics. I know that there is a right answer that you should subject them to more narrow discovery, only you may wish to reflect to on your tactics as a light constraint on your client.

MR. HEARD: I understand the point. Let me state what I take to be two problems. First is just a practical problem of an attempt to do narrow discovery requests dealing with these plaintiffs given our track record. One might, as Mr. Ablon, has suggested, ask for the production of documents that relate to the transaction on which these was some complaint that the client was cheated. That would certainly be a narrow one, a request.

The fact of the matter is the article mentions one transaction in particular, Steven Allen and the American Lutheran Church. Plaintiffs have alleged it was false to say anyone was cheated. But those are documents they provided us now, and we have had a chance to look at them. And no one looking at those documents would doubt all parties to that transaction—the celebrities and the clients—believed they were cheated, wrote it in letters and sent it in. Yet apparently based upon the allegation they are making, they would never produce those documents, then they say they don't contain allegations of cheating.

[17] THE COURT: You may end up seeking winning broad discovery. That is not the point at the moment.

MR. HEARD: I understand that.

That leads us to a second problem, Your Honor, and that is the scope of the protective order and the point Your Honor states that the burden should be on the Enquirer to prove that discovery was not the basis for something they subsequently published.

Your Honor, we would point to the problem that was recognized by the courts in New York in a case, Reliance Insurance versus Barrons. They said they thought these kinds of orders were impossible of enforcement and the problem there would be exacerbated here if the burden is to be on the Enquirer.

It is not uncommon for the Enquirer sources, as the court can imagine, to have information about celebrities of varying types. They have got addresses and phones numbers. Those are fairly easy to come by. If we publish an article about somebody whose names is mentioned, the court is placing the burden on us to come in and not only justify which we think is imposition enough, First Amendment rights serious already, and you are saying come in and if you have confidential sources for those articles, the burden is going to be on you to identify those confidential sources to the court and show what information they provided and that those confidential sources had information independent of the discovery in the case.

It is not only placing a burden on us that is the problem; it is a burden to lead to an implication of the First [18] Amendment right which is if we have confidential sources, we have to come in and discover those, not only confidential source in this case but confidential source related to other articles; so we think putting that twist on the court's protective order presents problems above and beyond those in any other cases discussed before.

THE COURT: Correct. That is why I think it important to make that up front. Of course, it is clear that the one thing that could not happen would be that the Enquirer or any individual reporter would be held in contempt for failing to discover [*sic*—disclose] confidential source.

Indeed the sanction—the ultimate sanction that could possibly be imposed for the Enquirer publishing something that appeared to be the fruit of its discovery in this lawsuit in violation of the court's order, the ultimate sanction could be the entering of the judgment against the Enquirer in this case. It could not be an order to disclose—it could not be a contempt order to disclose—to punish one for not disclosing confidential source, nor even would I anticipate an order would be made directing the Enquirer to disclose its source.

The Enquirer then would have the burden of doing whatever it is going to do to establish independent source if it publishes one of these things, and the example you raised, Mr. Heard, demonstrates that it may be desirable to limit discovery. If you don't need to get celebrities' phone numbers through the court process, then plainly the Enquirer would be better off not using it, and vice versa if the Enquirer would be better off as an arts production taking advantage of sources in the community, [19] then that is what it should do.

MR. HEARD: Your Honor, it seems to me it puts the Enquirer in a very difficult position. Whether or not you say the sanction may be a judgment against the Enquirer, they can chose between revealing confidential source—which they need not do under California statute —or they may choose not to publish a story which relies on confidential source because the plaintiffs in this lawsuit might say this comes close, this looks like an article that was based on discovery in the case, and the Enquirer will be given a very unpleasant choice, and the choice it would seem contravenes an important First Amendment interest when they decide we must go to Judge Chernow and justify the article and disclose our source for the story or give in is a close question. We better not even publish this story even though we have an independent source because the risks are too great—we are going to have to break a pledge of confidentiality or we are going to have to risk the ultimate sanction of losing this lawsuit.

It seems to me, Your Honor, that, putting aside whether a protective order is a prior restraint, if we even talk about hidden sensitivity to First Amendment interest, this kind of order creates a real problem particularly when we just confront the predicate.

Your Honor is talking about potential for abuse, not abuse which relies on the ability given on these interrogatories and their production requests. We are simply not to that stage of asking the kind of objectionable in-

terrogatories that intrude on the personal sensitivity of [20] these people, and we are not there yet, and we may not get there.

THE COURT: That does raise one additional point. I think after the order is issued, I would hope that the Enquirer would promptly seek a writ so we can have the parties know at a very early stage whether the Enquirer's arguments would find more favor with the Court of Appeal so that then the information that is disclosed by court order then can confidentially be treated as confidential or not, and the Enquirer would then know whether it would take those risks or not in publishing information on the face of it appeared to have derived in from court ordered sources.

MR. HEARD: I understand, Your Honor. May I clarify one point?

Understanding the terms of the protective order Your Honor feels appropriate, where do we stand as to whether these interrogatories and production requests which we have singled out and discussed are objectionable on the grounds that plaintiffs have also before—that is, they are trade secrets, they have fallen within the right to privacy and he shouldn't have to produce information at all?

THE COURT: If, as Mr. Ablon said, with protective order many of these objections vanish.

MR. HEARD: That is the uncertainty we have coming from our meet and confer. We were told further information would be forthcoming. We didn't know whether this was all of the information requested.

THE COURT: I would in discovery and subject to some [21] limitation, and I think Mr. Ablon's suggestion you meet this morning to work out additional limitations is a good one. That time is a major limitation that I see, and others may be appropriate. I am not sure. The next item will be for you to meet this morning and see what you can come up with.

* * * *

APPENDIX D

Order of the Superior Court of the State of California for the County of Los Angeles

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 305 009

SHIRLEY JONES and MARTY INGELS,
Plaintiffs,

v.

NATIONAL ENQUIRER, INC., et al.,
Defendants.

ORDER RE DISCOVERY HEARINGS OF
OCTOBER 25, 1982

On October 25, 1982, at 9:00 A.M., the motions of plaintiffs, Marty Ingels and Shirley Jones, for a protective order, for an order compelling production of documents, and for an order compelling further answers to interrogatories, and the motions of defendant, National Enquirer, Inc., for an order compelling answers to interrogatories and compelling production of documents, came on regularly for hearing in Department 80, the Honorable Eli Chernow, Judge presiding.

Plaintiffs appeared through counsel, Hayes & Hume, a professional corporation, by Paul S. Ablon, Esq., and Barry B. Langberg, Esq., and defendant, National Enquirer, Inc., appeared by its counsel, Williams & Connolly, F. Lane Heard, III, Esq.

Based upon the papers filed in connection with these motions, the pleadings, records and papers on file in this matter, and the oral argument of counsel, the court now makes and enters the following order:

1. With respect to plaintiffs' motion to compel further answers to interrogatories, defendant, National Enquirer, Inc. is ordered to answer without objection interrogatories 1A, 2A, 6A, and 17 within thirty days from the date this order is signed.

2. With respect to plaintiffs' motion to compel production of documents, defendant, National Enquirer, is ordered to identify without objection and produce without objection the documents categorized in plaintiffs' request No. 3 and No. 4 within thirty days of the date this order is signed.

3. With respect to plaintiffs' motion to compel further answers to interrogatories re Newsman's Source, defendant, National Enquirer, Inc., is ordered to identify as sources each and every person as yet heretofore unidentified as a source of information for the article which is the subject of this litigation, within thirty days of the date of signature of this order. Plaintiffs have made a sufficient showing of effort and continuing burden such that all First Amendment criteria, if any, have been satisfied. Moreover, it would be inequitable and unduly expensive to require plaintiffs to conduct further investigation, especially in light of the inaccurate and inconsistent information about sources previously provided by defendant upon which plaintiffs have relied to their detriment.

4. With respect to defendant, National Enquirer, Inc.'s motion for an order compelling answers to interrogatories and production of documents, said motion is denied. However, pursuant to stipulation of the parties, it is ordered that plaintiff, Ingels, provide to defendant, National Enquirer, Inc., for the period commencing with January 1, 1977, and ending one year after the publication of the subject article, the following:

(a) The identity of all Ingels, Inc. employees then employed;

(b) The names of all Ingels, Inc. celebrity clients who signed a contract with that entity during the specified period and received monies pursuant thereto;

(c) The names of all Ingels, Inc. advertiser clients for which client files were opened during the specified period.

5. The information required to be provided pursuant to Paragraphs 4(a), 4(b) and 4(c) shall be furnished within thirty days after the date upon which any writ, pretrial or other appellate proceeding or series of such proceedings originally initiated by defendant, and challenging any part of the protective order embodied in this document, shall become final for all purposes and not subject to further challenge; or within 30 days after the date defendant files with this court, after prior service on plaintiffs, a written waiver of any further right to challenge in pretrial appellate proceedings the validity or enforceability of any part of this order.

6. Production by plaintiffs of any documents or information required pursuant to Paragraphs 4(a), 4(b) or 4(c) of this order which are claimed by any plaintiffs to be protected by rights or privileges of privacy, to be protected by any privilege of confidential business information, or which would violate confidence if disclosed, as for example, but by way of illustration and not limitation, the identiy of employees of Ingels, Inc., the identities of celebrities or clients with whom any plaintiff or Ingels, Inc. has dealt, or any information concerning any sexual experience or sexually related material of any plaintiff, (hereinafter, such documents and/or information are referred to as "protected material"), shall only be produced conditioned upon strict compliance with this protective order.

7. It is further ordered that the following procedures be applied to documents and information produced by plaintiffs pursuant to defendant's first set of interroga-

tories and first set of requests for production of documents or pursuant to subsequent requests by defendant:

(a) Any documents or information produced under this order which, in the judgment of plaintiffs, contain trade secrets not heretofore publicly disclosed or matters within the scope of Article I, Section 1 of the California Constitution not heretofore publicly disclosed, may be designated as confidential by plaintiffs. Plaintiffs' attorneys shall advise defendant's attorneys before or at the time of producing any documents or information of any material that should be treated confidentially. Defendant may object to any such designation. If plaintiffs and defendants cannot resolve defendant's objections, plaintiffs shall within ten days after being requested to do so by defendant present the question to the court for resolution.

(b) All documents and information designated as confidential (hereinafter referred to the "Confidential Documents") shall be subject to the provision of this order.

(c) Counsel for defendant shall inspect all Confidential Documents provided by plaintiffs at a time and location agreed upon by counsel. Upon request, one copy of any Confidential Document shall be provided to defendant at its expense. Each copy so provided shall be marked as a Confidential Document subject to the terms of this order.

(d) Confidential Documents or copies thereof shall be made available only to the attorneys providing counsel to defendant in this proceeding; any persons regularly employed by such attorneys assisting them in this litigation; the officers and employees of defendant with whom such attorneys find it necessary to consult in the defense of this litigation; and experts consulted by counsel to provide advice, assistance, or testimony in this litigation. Such persons shall maintain the confidentiality of all Confidential Documents. Each non-attorney to whom disclosure is made shall sign a copy of this Order, signify-

ing his agreement to be bound by its terms and to be subject to the jurisdicaion of this court in all matters relating to this order.

(e) No copy of any Confidential Document shall be made except at the express direction of counsel for dcfendant.

(f) Confidential Documents shall be used in depositions in a manner that will preserve the confidentiality of those portions of the transcript that deal with such information. Upon transcription of any deposition, sounsel for plaintiffs may, in accordance with paragraph A of this order, designate those pages containing information that he contends should be treated confidentially. Any objection by defendant to such designation shall be resolved pursuant to the procedure set forth in paragraph A. Any such pages shall be marked in accordance with paragraph C, and the cover of the transcript shall bear the legend "Contains Confidential Material."

(g) The Confidential Documents shall be used solely for the purpose of preparing this action for trial and at the trial thereof and for no other purpose.

(h) No Confidential Document or any information contained therein or discovered as a result of access to Confidential Documents which relates to plaintiffs, their business(es), or their relatives shall be published in any publication owned or controlled by defendant.

(i) Plaintiff may seek by noticed motion specific enforcement of this order and/or sanctions for its violation. All papers filed in connection with any such motion shall be filed under seal. Counsel may request hearing of such motion in chambers. Upon a showing that defendant has published or caused to be published information described in paragraph H, it shall be presumed that defendant has violated this order. The burden shall be on defendant to establish by a preponderance of the evidence that any such information published or caused

to be published by it was obtained independently and not as a result of access to Confidential Documents.

(j) Nothing in this order shall prevent defendant from publishing information identical to that contained in Confidential Documents, provided that such information was not discovered as a result of access to Confidential Documents.

(k) At the conclusion of this litigation, all Confidential Documents and copies made thereof shall be promptly returned to counsel for plaintiffs.

(l) Nothing herein shall preclude any party from applying to the court for any modification of this order as may be appropriate.

DATED: JAN. 5, 1983

/s/ Eli Chernow
ELI CHERNOW
Judge of the Superior Court

APPENDIX E

Constitutional Provisions

The First Amendment to the Constitution of the United States provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> "Section 1 . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Supreme Court, U.S.
FILED
MAY 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1770

In The

Supreme Court of the United States

October Term, 1982

NATIONAL ENQUIRER, INC.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

SHIRLEY JONES, MARTY INGELS,
Real Parties In Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Note, *"The First Amendment Right to Disseminate Discovery Materials: In Re Halkin", 92 Harv. L. Rev.* 1550 (1973) 16

American Law Institute, *Restatement of the Law, Second,* Torts 2d, § 652D, *comment* h 2

No. 82-1770

In The

Supreme Court of the United States

October Term, 1982

NATIONAL ENQUIRER, INC.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

SHIRLEY JONES, MARTY INGELS,
Real Parties In Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Justices Of The United States Supreme Court:

Real Parties Shirley Jones ("Jones") and Marty Ingels ("Ingels") (collectively, "Real Parties"), hereby file this brief in opposition to the Petition for Certiorari filed by the National Enquirer, Inc. ("Enquirer" or "Petitioner").

I.

INTRODUCTION

This matter centers around the National Enquirer's desire to publish private facts about Real Parties which it has discovered or may discover solely by virtue of the

discovery processes of the California trial court and which are not a matter of public record.[1]

Real Parties and the trial court shared the concern that, absent an appropriate protective order, the Enquirer, under the asserted protection of the First Amendment, would publish sensitive, irrelevant and prejudicial statements, allegations or documents in order to coerce an unfair settlement or prevent a fair trial by disseminating such harmful "facts" in advance of trial to poison the well of potential jurors without judicial scrutiny or control. This precise dispute involves no restrictions on the rights of the Enquirer's counsel to seek, obtain or utilize such information in accordance with the applicable rules of evidence and procedure and in no way represents any potential restriction on the abilities of counsel to defend their client in the proper forum of a court, rather than the questionable tribunal of public opinion. Indeed, despite Petitioner's claimed defenselessness, its continuing discovery since the entry of the subject Protective Order has been consistently wide-ranging and aggressive on all fronts.

By bringing the underlying action, Real Parties have logically waived their constitutional rights of privacy, if at all, (American Law Institute, *Restatement of the Law Second,* Torts 2d, § 652D, *comment* h) only to the extent germane to the purposes of the lawsuit and not for all purposes. Accordingly, the Enquirer is entitled to informa-

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[1]Under the pertinent provision of California's Discovery Act, Code of Civil Procedure §§ 1985 et seq., answers to interrogatories, responses to requests for admissions, documents produced in response to subpoenas or requests and deposition transcripts are not filed with the court and do not become public records unless lodged with the court in connection with a particular motion or trial.

tion it seeks for purposes of its legal defense only and is not entitled to enlist judicial aid in collecting distasteful grist for its defamatory mill.

The Enquirer cries for special protection and claims a special "urgency" in dealing with the trial court's limited Protective Order of January 5, 1983, ("Order" or "Protective Order") which is the subject of its Petition For Writ of Certiorari ("Petition"). However, not only is there no need for urgency, there is no need for review and there is no need for summary reversal. If the Enquirer's claimed First Amendment right to expose private facts discovered exclusively through court processes about the lives of celebrities is sanctioned, the propriety of the judicial process will be threatened and the rights of all private litigants, celebrity and non-celebrity alike, trampled.

As demonstrated below, Real Parties provide an accurate representation of the nature and scope of the Protective Order at issue, and the facts cry out for the minimal protection accorded plaintiff, Jones, and former plaintiff, Ingels.[2] The Order has been upheld by both the intermediate and highest appellate courts of California and contains only those provisions necessary to insure that the judicial discovery process does not become an investigative arm of the editorial staffs of publishers and make

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[2]Since the entry of the order, Ingels has dismissed his lawsuit without prejudice. However, to the extent of confidential information germane to him or his business has been or will continue to be discovered, he is still interested in this Petition. His concern is particularly justified by the Enquirer's continuing efforts in discovery, even after his dismissal, to elicit as much harmful and unfavorable information about him as possible. Since he is no longer a party to this action, it must be presumed that such efforts are for purposes other than the Enquirer's legal defense.

the order realistically enforceable. Accordingly, this court should dismiss the Petition and let the lower courts' well reasoned judgment stand.

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II.

STATEMENT OF FACTS

A. Procedural History

On or about October 9, 1979, the National Enquirer, ("Petitioner") published a false and defamatory article about Jones and Ingels containing the most pernicious gossip. A true and correct copy of this article is attached hereto as Exhibit "A" ("subject article"). The subject article accused Jones, an actress, of being a "crying drunk," "blurring her lines" on the set of her television show as a result, and forcing the cessation of filming because of her inebriation. Ingels, Jones' husband, was accused of having a "notorious casting couch" and cheating celebrities and advertisers.

As a result of the subject article, in November, 1979, Jones and Ingels initiated this lawsuit asserting claims for libel, invasion of privacy and intentional infliction of emotional distress and alleging that "[s]aid article is false, untrue, libelous and defamatory" (Tab 10, pg. 3).[3] It was on this basis that the trial court heard Jones and Ingels' Protective Order request on October 25, 1982. The trial court's spontaneous comments at that hearing (Petition, Appendix C) were ultimately refined and embodied

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[3]All references to "Tab" numbers are to those documents included in Appendix "A" to The Enquirer's Petition For Writ of Mandate filed in the California Court of Appeal.

in a written order of January 5, 1983 (Petition, Appendix D4).[4]

Petitioner's Petition For Writ of Mandate to the California Court of Appeal was denied on March 9, 1983, and its Petition For Hearing to the California Supreme Court was also denied on April 13, 1983.

B. Facts Justifying Protective Order

Contrary to the Enquirer's contention that "[t]he order here is based on no findings whatsoever and no evidence whatsoever" (Petition, p. 11), the factual record demonstrates a compelling need for the protective order issued in this matter.

The Enquirer is a publication[5] with a huge national circulation[6], dealing to a large extent with "celebrity gossip" (Tab 5, p. 5) and engaged in a "form of legalized pandering designed to appeal to the reader's morbid sense of curiosity" (Tab 5, p. 6). Petitioner categorically refuses to enter into any stipulation limiting its asserted plenary rights to publish any and all information it might

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[4]The Petition interweaves portions of the Order with the comments of the trial court at the hearing, hoping to meld the most favorable of each into an amalgam which this Court should consider and overturn. In fact, the Enquirer mischaracterizes the oral statements of the judge as the "oral opinion" of the Court, (Petition, Appendix C) although it was at all times contemplated that a written order would embody the final statement of the Court's ruling. (Petition, Appendix D).

[5]Although adjudicated in *Burnett v. The National Enquirer*, LASC No. C157213, to be a magazine for purposes of the California Retraction Statute, California Civil Code § 48a, the Petition still suggests that it is a "newspaper" (Petition, p. 8). However, since this very point is currently before the California Court of Appeal, (2d Civ. No. 66447) Real Parties will simply refer to Petitioner as "a publication".

[6]The Enquirer's circulation nationwide is approximately 4,000,000; its readership, approximately 18,000,000. California is the state of its largest circulation and readership.

uncover solely in discovery through the efforts of its attorneys (Tab 5, p. 7).

Petitioner's publishing record and discovery efforts to the date of the Order justifies the trial court's concern that abuse of the discovery process might occur, affording Petitioner improper leverage in the litigation which the judicial process is not intended to afford any litigant (Petition, Appendix C, p. 9a). Although the article clearly deals with sensitive matters, the unbridled discovery efforts of Petitioner transcend the bounds of good faith and relevance to seek improper, intimate, personal and business information about Real Parties which has no arguable connection to the underlying lawsuit, especially since the dismissal of Ingels.

Petitioner claims inaccurately that the trial court made no suggestion that any of the "discovery requests . . . were unreasonable in themselves . . . and that the court said its discovery was 'proper' " (Petition, p. 6). In fact, Paragraph 4 of the Order *denies* certain of Petitioners' then pending Motions for further discovery heard that same date (save for some information Real Parties' counsel stipulated would be provided after a narrowing of the original request). The trial court was and is obviously and properly concerned with the unwarranted overbreadth of Petitioner's discovery (Petition, Appendix C, p. 4a). Contrary to Petitioner's suggestion, the trial court never suggested that its discovery was proper or necessary. Rather, the trial court merely indicated that Petitioner might in the future end up with "sensitive information because of the proper use of the discovery process" (Petition, Appendix C, p. 9a).

Among other things, the Enquirer seeks information regarding all "clients for whom [Ingels] served as a

celebrity broker," (Tab 1, p. 6, Interrogatory No. 15) (the Petition for Certiorari itself suggests that there were at least 139 persons in this category alone, Petition, p. 16); financial information concerning Ingels' celebrity broker business, Ingels, Inc. (Tab 1, p. 6, Interrogatory 16); the identity of "each person with whom [Ingels] ha[s] had sexual relations in the past five years" (Tab 1, p. 8, Interrogatory No. 25); "each person of whom [Ingels] have or have had nude or semi-nude photographs" (Tab 1, p. 8, Interrogatory 26); the details of confidential business transactions (Tab 1, Interrogatory Nos. 13 and 20); and other such private and confidential matters. Not coincidentally, some of the subjects of Petitioner's discovery were the precise types of valueless "celebrity gossip" of an intimate nature which Real Parties fear would be published in advance of trial.

The record below thoroughly documents that preserving the confidentiality of the business information sought by Petitioner is necessary (*See generally,* Tab 5, pp. 11-12; Tab 5, pp. 14-15), since revelation of Ingel's customer lists, confidential contract terms, and business information would disadvantage him in the highly competitive market in which he operates (Tab 5, p. 11). The involvement of Real Parties' state and federally protected constitutional privacy rights as they relate to the intimate sexual matters is also clear and was in fact admitted by Petitioner in the trial court (Tab 6, p. 4, n. 2).

III.

THE TRIAL COURT'S ORDER IS NOT UNNECESSARILY RESTRICTIVE GIVEN THE BALANCE OF INTERESTS INVOLVED

Presented with the clear and present risk of abuse of discovery and harm to Real Parties which Petitioner and

its threat of publication presents, along with its refusal to stipulate to any limitation on its asserted publication prerogatives, on the one hand, and the sensitive business and intimate personal constitutionally protected information sought, on the other, the trial court thoughtfully stated its motivation for its order:

> "[The Enquirer] is a very powerful media source which published an article that is clearly damaging to the plaintiffs in this case, that they exercised their right to litigate. As a result of that, then they are compelled to provide information to your client, and your client may well end up getting sensitive information about celebrities, very newsworthy information, because of the proper use of the discovery process.
>
> "That information, however, is plainly subject to misuse and abuse that plainly is subject to the use, as a sledge hammer, to hurt those who seek to bring an action against a powerful publication or those who would seek to help people in that situation and that those people who have obligations to provide truthful information may find themselves on the front page of the Enquirer if there isn't a protective order." (Tab 7, p. 8, at 9-22)

The court in rendering its decision evidenced its sensitivity to the rights and interest of all litigants, stating:

> "In any event, I think this is the appropriate time and place for a protective order, at the beginning of court ordered discovery, that I certainly anticipate that the parties will be able to resolve a number of their disputes, and they should have as a background for that resolution the protective order. . . . That one has to balance the danger of a restraint on a publication against the danger of an abuse of the power of that publication to unfairly prejudice the rights of litigants to come to court to seek redress for an alleged wrong. (Tab 7, pp. 13-14)

A fair analysis of the protective order at issue here shows that it bears only slight resemblance to the order which Petitioner's hyperbole suggests.

First, the order places no restriction or limitation whatever on the scope of Petitioner's discovery or its ability to "defend itself". It is concerned solely with insuring the use of information gathered by access to the discovery process for proper litigation purposes and not for improper purposes such as pre-trial publication for unfair advantage (Petition, Appendix D, para. 7g and h). To that end dissemination of the information is limited to counsel and persons necessary to the litigation of the matter (Petition, Appendix D, para. 7d).

Further, Petitioner flatly misstates the record when it states that the "trial court urged" that it "constrict its discovery" (Petition, p. 8, n. 5). This is an extraordinary and false characterization of the trial court's conduct. The trial court suggested that, in light of the protective order, Petitioner might want to limit its clearly overbroad discovery so as to steer clear of irrelevant areas of fact not helpful to its defense which it might desire to publish. This was simply to avoid any requirement under the order to demonstrate that published information identical to that obtained through discovery was independently obtained. ("I think the Enquirer should have fair notice of that so that they can narrow the scope of what they are seeking through the court's process if they so choose" (Petition, Appendix C, p. 14a). "Now it may be that the Enquirer would prefer not to conduct such broad discovery so that its ability to publish stories it wants to publish is not constrained by it in this case". ". . . I want to give you an opportunity to think through your tactics" (Petition, Appendix C, pp. 15a and 16)).

Petitioner's contention that the order applies to "any information designated by Ms. Jones and Mr. Ingels as 'confidential documents or information'" (Petition, p. 6), is equally misleading. In fact, the protective order specifies the certain categories of material covered thereby, such as "sexually related material" (Petition for Certiorari, Appendix D, para. 4(a)-(c) and 7), and allows Real Parties, when discovery is sought to designate information within those categories protected by the Order. Real Parties cannot designate "any information" under the Order, but only that within the specified categories. Furthermore, the Order is equally sensitive to Petitioner's interests, since it renders Real Parties' designation of confidential information *ineffective* if Petitioner objects that the designation is not within the categories of protected material, and if *Real Parties* do not apply to the court within ten days to resolve the issue (Petition, Appendix D, para. 7a).

Not surprisingly, those portions of the Protective Order to which Petitioner directs its primary concern are those which are absolutely necessary to render the order practically enforceable; first, the extension of the protection to not only the actual material discovered but to the fruits thereof (Petition, Appendix D, para. 7h), and, second, after a showing by Real Parties that discovered information or the fruits thereof had been published, the placing of the burden of establishing that the published information was independently obtained on Petitioner (Petition, Appendix D, para. 7i).

Petitioner makes much of the fact that the protective order applies not only to protected material obtained in discovery, but also to information which may be gener-

ated or discovered through access to that material (Petition, p. 6). As Petitioner is obviously aware, without this requirement the protective order can be easily circumvented. An order precluding publication only of the very information discovered if applied, for example, to information regarding any "sex partners" Ingels may have had, could be circumvented simply by using the information provided to contact those persons and then obtain the very information discovered which could then be published.

An order that precludes merely the publication of information produced to the Petitioner, while not restricting the Petitioner from utilization of such discovered information as telephone numbers to bother, harass or otherwise intrude on the personal life of the Real Parties is a hollow protection to Jones, Ingels, Ingels' celebrity clients, or their past or present acquaintances.

That portion of the protective order placing the burden on Petitioner to demonstrate that publication did not derive from access to discovered information is another provision which if eliminated would render the order meaningless, since as the trial court aptly observed, ". . . the only way to prevent an abuse of process is to presume and put the burden on the Enquirer" (Petition, Appendix C, p. 14a).

Petitioner, however, fails to point out that before the burden is placed on it to demonstrate that the published material did not derive from access to confidential discovered material, Real Parties must make a "showing" that information subject to the order was in fact pub-

lished.[7] That showing would include, when applicable, proof that Petitioner obtained the material it published as a "fruit" of discovery. This is an extremely heavy burden for Real Parties to bear, for it requires a showing that the Petitioner's investigative process led to the information that was ultimately published.

Placing the burden on the Petitioner after Respondents make their showing of publication effects little change, if any, in the ordinary allocation of the burden of proof. When Real Parties satisfy their burden of demonstrating that personal and intimate information has been published and that this information was provided in confidential discovery material, a permissible inference arises that the publication in fact derived from access to that same confidential, discovered material.

Allocating the burden to Petitioner to demonstrate that the published information did not derive from access to confidential information is consistent with the time honored method of allocating the burden to the party having exclusive control over the evidence. If Petitioner would have difficulty in proving that it obtained the information from independent sources, how could Real Parties possibly make such a showing? If any party has the ability to prove that the published information did not derive from discovered information or access thereto, it is the Petitioner.

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[7]Petitioner flatly mischaracterizes the Order when it states that the prohibition applies even to information obtained from and verified by independent sources, if it was published as the result of access to "discovery information". (Petition, pp. 7-8). In fact, that court meticulously distinguished between independently discovered information which may also have been obtained in discovery. So long as it was truly independently obtained it can be published with impunity even though it was also obtained in discovery.

IV.

WHEN ACCURATELY ANALYZED THE ORDER PRESENTS NO CONSTITUTIONAL INFIRMITY

The entire Petition is grounded upon at least three faulty premises: first, that a protective order regulating the Court's own processes is a prior restraint or otherwise subject to constitutional limitation; second, that there is a newsman's source privilege which would be of necessity violated by Petitioners having to meet its burden of showing that independently of discovery it obtained material which was published and; finally, that if it does have First Amendment claims in this situation, they automatically warrant ignoring Real Parties' constitutionally based rights.

A. The Regulation Of Pre-Trial Procedures, Including Discovery, To Insure A Fair Trial Is Well Within The Court's Control And Not Generally Susceptible To First Amendment Challenge.

Although protective orders may restrain communication by the discovering party with third parties, they traditionally have not been thought to raise First Amendment interests in disseminating information received in discovery.

This court has made clear that special potentially harmful characteristics of a particular type of speech involved may render inapplicable the prohibition against prior restraints. *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U. S. 748, 771-772 (1973). Such a principle is aptly applied to information generated by use of court processes.

Furthermore, the very issue presented here was fairly resolved in *International Products Corporation v. Koons*, 325 F. 2d 403, 407-408 (2d Cir. 1963), where Judge Friendly distinguished between information obtained in discovery and that obtained independently. He rejected a First Amendment attack on a protective order limiting use of information obtained in such discovery, stating:

> "The portion of the order which seals the deposition of Seldes and limits defendants and others in their use of information obtained therefrom was plainly authorized by F. R. Civ. Proc. 30(b) and we entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing in advance of trial, of information obtained by one party from another by use of the court's processes. Whether or not the rule itself authorizes so much of the order as also seals all affidavits submitted by defendants on various motions, we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of the court's of law our and their own process, to prevent abuses, oppressions and injustices.'" [citation omitted]

In *Parker v. Columbia Broadcasting Systems*, 320 F. 2d 937, 938-939 (2d Cir. 1963) the court upheld a protective order restricting the use of information gained in the discovery process against constitutional challenge, stating:

> "Insofar as the order enjoins appellant from 'in any way publishing, disseminating, publicizing, or otherwise promulgating to any person or entity, all or any portion of the document', we hold that, in view of the nature of the document, the order was properly issued under the inherent 'equitable powers of courts of law over their own process to prevent abuses, oppression and injustice'".

The Third Circuit in *Rogers v. United States Steel Corp.*, 536 F. 2d 1001, 1006 (3d Cir. 1976) has stated:

> "It may well be, for instance, that the parties and counsel, by taking advantage of or a part in the discovery processes, implicitly waive their First Amendment rights freely to disclose or disseminate the information obtained through those processes. *Cf. International Products Corp. v. Koons* . . . Thus, for purposes of this appeal, we assume arguendo that if the district court had prohibited disclosure only of information derived from the discovery processes, its order would have been constitutional."

California courts appear to have adopted the same position. *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313 (1982).

The Order at bar meticulously distinguishes between information obtained independently of court processes and that obtained from those judicial processes. Only the latter is subject to the order.

In support of its First Amendment claims, Petitioner heavily relies upon, among other cases, Judge Bazelon's opinion, over a sharp dissent, in *In Re Halkin*, 598 F. 2d 176, 188 (D. C. Cir. 1979). However, that case is inapposite on that point, as it concerned political matter, otherwise *public record*, which "lies near the heart of the information protected by the First Amendment", dealing with governmental surveillance of citizens opposed to the Vietnam War. The court noted:

> "An order restraining *publication of official court records open to the public*, or an order restraining political speech, implicates different interests than

an order restraining commercial information." *Supra* at 190.[8] (Emphasis added.)

Judge Wilkey's strong dissenting opinion argued:

"[W]hen a party uses the court's process in a manner which may be unfair to the other party and is unrelated to the litigation purpose of discovery, the court has the power and responsibility to take whatever action is necessary to protect its process from abuse. . . ." *Supra* at 208.

Judge Wilkey pointed out the logical contradiction of the majority's position. For "good cause", under the discovery rules, discovery can be denied altogether even if such a bar can seriously impair the party's ability to litigate effectively. The *Halkin* majority's illogical analysis requires a stricter standard to regulate the use of material of which discovery is permitted. *See,* Note, *"The First Amendment Right to Disseminate Discovery Materials: In Re Halkin"*, 92 Harv. L. Rev. 1550, 1553-54 (1979) (criticizing *In re Halkin*). Moreover, public records are not involved in California.

The key concern in these cases is precisely that shared by Real Parties and the trial court, that is, that Petitioner not be allowed to abuse the discovery processes to oppress and gain unfair advantage over Real Parties.

In Re Halkin and the first amendment principle for which it is cited has been roundly criticized by other courts. District Judge Becker, in *Zenith Radio Corp. v. Matushita*

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[8]It is precisely this type of commercial business information that is involved here, in addition to information within Real Parties' right of privacy. Unlike news agencies which cover trials or court proceedings for the public, Petitioner, all the while asserting the right to publish, makes no claim of public interest and no claim that the information it seeks to discover is inherently newsworthy.

Electric Indus. Co., 529 F. Supp. 866, 911-912 (E. D. Pa. 1981) stated:

> "The overriding purpose of a protective order is to facilitate the communication of the information between litigants. To accomplish that end, it may be necessary to limit speech by parties and their counsel outside the court. Several general governmental interests support the imposition and enforcement of such order. First, the courts must preserve the integrity of the discovery system and protect litigants from 'annoyance, embarrassment, oppression or undue burden or expense', Rule 26(c) and guard against abuse of their own processes. . . . Third, the courts have a general responsibility to do justice. Litigants in many cases cannot be guaranteed a fair trial of their claims and defenses if necessary documents and materials are not produced; at the same time, the court must seek to protect from unwarranted harm parties whose rights may ultimately be vindicated at trial [citation omitted]."

In rejecting *In Re Halkin*, Judge Becker concluded:

"In sum, we think that the proper standard for deciding not to declassify certain documents is not a 'heavy presumption' of unconstitutionality, but a balancing test." *In Re Halkin* has been further limited and questioned with respect to its First Amendment statements in the cases of *In Re Upjohn Company Antibiotic Cleocin Products*, 644 F. 2d 114 (6th Cir. 1981); and, *Brink v. Dalesio*, 82 F. R. D. 664, 677, 678 (D. Md. 1979).

Petitioner suggests that *In Re Halkin* has been approved by this court in *Gulf Oil Co. v. Bernard*, 452 U. S. 89, 102, n. 16 (1981). However, Justice Powell's citation of *In Re Halkin* in that case simply noted *Halkin's* proper

use of the standard for protective order under F. R. Civ. P. 26(c), which is not involved in this case.[9]

In Re San Juan Star Co., 662 F. 2d 108, 116 (1st Cir. 1981), also cited by Petitioner, acknowledges that "protective orders can also give judges the discretion to exercise their constitutional duty to protect litigants' right to a fair trial and privacy". The court refused to accept the position of the *In Re Halkin* majority that protective orders limiting dissemination of discovery information are prior restraints and utilized an analysis "midway between the majority and dissent in *Halkin*".

B. In Light Of The Fact That There Is No Constitutional First Amendment Deficiency In The Order, Petitioner's Spurious Newsman's Source Claims Should Be Dismissed.

As demonstrated above, there is no constitutional prohibition against protective orders regulating discovery. Accordingly, whether meeting the mandate of the protective order requires divulging of "confidential news sources" as Petitioner contends (Petition, p. 20) has little bearing.

That very contention is premised on a misconception; that there is a constitutionally created newsman's source privilege. Despite all the lower court authorities cited by Petitioner (Petition, p. 20, n. 13) this Court has found

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[9]N. 16 of *Gulf Oil Co. v. Bernard, supra,* stated "Cf. *In Re Halkin,* 194 U. S. App. D. C. 257, 274, 598 F. 2d 176, 193 (1979) ("To establish 'good cause' for a protective order under [Federal Rule of Civil Procedure] 26(c); [t]he courts have insisted on a particular and specific demonstration of fact, as distinguishes from stereotyped and conclusory statements) . . ."

no such privilege. *Branzburg v. Hayes,* 408 U. S. 665 (1972) concluded in the criminal grand jury context that no such privilege, absolute or conditional exists. In *Herbert v. Lando,* 441 U. S. 153 (1979), a civil libel litigation, this court also failed to find an absolute newsman's editorial and source privilege and suggested by its rationale that *Branzburg* would be totally applicable in the civil context, barring even a conditional privilege.

Moreover, the problems which such a privilege poses are aptly illustrated in this case. The trial court ordered disclosure of all sources, stating that further efforts at independent investigation were not necessary because of all of the inaccurate information Petitioner had provided in discovery upon which Real Parties had relied to their expense and detriment (Petition, Appendix D, p. 21a).

C. Petitioner's Position Ignores Real Parties' Constitutional Rights To Privacy And A Fair Trial.

Remarkably absent from the Petition for Certiorari is any reference whatsoever to Real Parties' constitutional rights, on the assumption that no rights other than Petitioner's warrant consideration. However, Real Parties have privacy and other first amendment rights and a right to a fair trial which must be balanced with Petitioner's. The trial court properly did so in its Order.

Real Parties' rights to privacy have been clearly and admittedly implicated by Petitioner's discovery. A fundamental right to privacy has been found embodied in the United States Constitution, in the penumbra to the Bill of Rights. *Griswold v. Connecticut,* 381 U. S. 479 (1965). *Griswold* dealt with the same subject which was an object of Petitioner's discovery, that is matters related to the intimacies of a person's sex life.

California has also enshrined such a Constitutional right in Article I, Section 1 of its Constitution which defines inalienable rights, stating:

> "All people are by nature free and independent, and have inalienable rights. Among these [is] . . . privacy."

California courts have gone to some lengths in enumerating matters within this constitutionally protected right of privacy. These include associational rights and medical histories, *Britt v. Superior Court,* 20 Cal. 3d 844 (1978); matters relating to individuals' sexual conduct, *Fults v. Superior Court,* 88 Cal. App. 3d 899 (1979) and *Morales v. Superior Court,* 99 Cal. App. 3d 283 (1979); matters relating to the personnel files or information within an employer/employee relationship, *Board of Trustees v. Superior Court,* 119 Cal. App. 3d 516 (1981), and financial information of a personal nature, *Cobb v. Superior Court,* 99 Cal. App. 3d 543 (1979), *Dompeling v. Superior Court,* 117 Cal. App. 3d 798 (1981), and *Valley Bank of Nevada v. Superior Court,* 15 Cal. 3d 652 (1975).

The foregoing enumerated zones of privacy are not exclusive, but merely illustrations of the general proposition that where there exists a "reasonable expectation of privacy", *Valley Bank of Nevada v. Superior Court, supra,* the constitutional guarantees will operate.

This rather extensive and significant line of Federal and California authorities is understandably ignored in Petitioner's one-sided critique of the protective order. Fortunately, its significance was not lost on the trial court which appropriately balanced all the parties' rights in this dispute.

Even Real Parties' First Amendment rights may be implicated at bar. As stated in *Wooley v. Maynard,* 430 U.S. 705, 714 (1979). "[B]oth the right to speak freely and the right to refrain from speaking at all" are embodied in freedom of speech. Thus "in absence of sufficient justification, a court's denial of a motion for a protective order may itself be an unconstitutional infringement of the producing party's first amendment rights". Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: the First Amendment and Good Cause,* 1980 Duke L. J. 766, 793.

In addition, Real Parties are entitled to have a trial by a jury consisting of citizens who have not been inundated by Petitioner's pre-trial publication of judicial discovered "facts", edited and embellished for maximum effect on potential jurors. Real Parties offer to prove that before trial in the *Carol Burnett* case, the Petitioner engaged in a massive nationwide image building radio and television campaign which included numerous assertions that this subject article and many others were true. For this there is no effective right of cross-examination. There is no reason why the safeguards against prejudicial pretrial publicity afforded in criminal cases cannot be similarly afforded Real Parties, who have a real and legitimate fear of Petitioner's "siedge hammer" (as the trial court put it) tactics.

When these rights of Real Parties are balanced on the scale, it is clear that the protective order here is as narrow as possible while still realistically and practically retaining the ability to protect all parties' interests.

V.

CONCLUSION

The trial court's Protective Order reflects a sensitive and delicate balancing of the significant rights of Real Parties, the interests of Petitioner and the clear and present danger for abuse presented. It seeks to insure that its processes are used for litigation, not publication. To permit its improper use outside of litigation would be to give Petitioner a bludgeon with which to pressure Real Parties with concerns unrelated to the litigation. A fair reading of the order makes clear that it is tailored as narrowly as possible, consistent with considerations of practical enforceability. Under these circumstances, there is no reason why this order should be reversed.

In the event review is contemplated, we commend the Court's attention to *Seattle Times v. Rhinehart,* No. 82-1721, which involves similar issues in the protective order —libel context.

Respectfully submitted,

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No. 82-1770

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OCTOBER TERM, 1982

NATIONAL ENQUIRER, INC.,
Petitioner,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,
SHIRLEY JONES,
Real Party in Interest.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1770

NATIONAL ENQUIRER, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

SHIRLEY JONES,
Real Party in Interest.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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1. The Brief in Opposition does not accurately describe the order sought to be reviewed here. The discovery covered by the order is not as to Mr. Ingels' sex life, contrary to the allusions in the Brief in Opposition.[1] Rather,

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[1] If Petitioner were to ask any improper questions in discovery about Mr. Ingels' sex life or anything else, the trial court has ample power on objection to disallow them. Those sorts of ordinary discovery objections are not before this Court. What this case involves, instead, is the trial court's restriction imposed on writing about subjects of inquiry it finds *not* objectionable, subjects within "proper use of the discovery processes." Petition for Certiorari at 9a. Reversal of the overbroad order does not limit the trial court's continuing power to control the proper scope of discovery.

the order prohibits Petitioner from publishing material (unless it can overcome the presumption of violation) relating to the following three subjects:

> "(a) The identity of all Ingels, Inc. employees then [1977-1980] employed;
>
> "(b) The names of all Ingels, Inc. celebrity clients who signed a contract with that entity during the specified period and received monies pursuant thereto;
>
> "(c) The names of all Ingels, Inc. advertiser clients for which client files were opened during the specified period." See Petition for Certiorari at 21a-22a.

That is the discovery that the trial court's order addressed. That, plus a vast undefined area of whatever the trial court might consider "fruits" of those three lists of names, is what its restrictive order applies to.

The assertions in the Brief in Opposition that Mr. Ingels is guarding supposed interests of client privacy is ludicrous in light of the record, which shows without dispute that Ingels, Inc. purchased a large display advertisement in a Hollywood directory as a self-promotion in which it listed, in large typeface and by name, no fewer than 139 of Ingels' own clients.

2. The Brief in Opposition fails to address, explain, cite, or even acknowledge the existence of any of the following decisions of this Court that are relied on in the Petition for Certiorari:

> *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931);
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> *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97 (1979);
>
> *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978);
>
> *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976);

New York Times Co. v. *United States*, 403 U.S. 713 (1971);

Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971);

Minneapolis Star & Tribune Co. v. *Minnesota Commissioner of Revenue*, 103 S.Ct. 1365 (1983);

Speiser v. *Randall*, 357 U.S. 513 (1958);

Smith v. *California*, 361 U.S. 147 (1959);

Perry v. *Sindermann*, 408 U.S. 593 (1972);

Oklahoma Pub. Co. v. *District Court*, 430 U.S. 308 (1977);

and several others.[2]

3. The Brief in Opposition, at 13, denies that a protective order is "subject to constitutional limitation." That denial is nonsense. Every order of every court in this country for every purpose is subject to the Constitution.

4. The Brief in Opposition cites no authority or precedent whatsoever, not a single case, to justify placing on a newspaper the burden of overcoming a presumption that its publishing is illegal. That burden is particularly inappropriate because the record contains *no evidence whatsoever* that Petitioner *ever* published information obtained in discovery; the order rests entirely on the trial court's totally unsubstantiated concern.

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[2] The Brief in Opposition, at 15, quotes out of context from *Rodgers* v. *United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976). That case held *invalid* under the First Amendment a protective order that, like the present one, affected information obtained other than through discovery. The court noted, for example, that "even if we were to agree that the information was privileged, and we entertain serious doubts on this point, that fact alone would not justify a prior restraint on speech here," 536 F.2d at 1008, because of "the rigorous standards by which we judge prior restraints of speech," *id.* at 1007. The same was held in *International Products Corp.* v. *Koons*, 325 F.2d 403, 408 (2d Cir. 1963).

5. Throughout the Brief in Opposition are suggestions —without any support whatsoever in the record—that discovery is sought for the purpose of some extra-judicial publicity campaign to influence prospective jurors. *E.g.*, Br. Op. at 7, 9, 21. There is no such finding; there was no such evidence, not a scintilla; and counsel represent to this Court that there is no basis in fact for that unseemly assertion. Undersigned counsel do not practice law that way. The problem with the order of the trial court is that it restrains the client from writing about a long list of newsworthy public figures (including Ms. Jones and Mr. Ingels, who themselves have appeared on television often and as recently as last week to denounce the National Enquirer) unless it can prove by revealing sources that whatever it says about them was not even indirectly a "fruit" of discovery.

6. We note again that Petitioner here does not contend that there can never be restraints on use of materials produced in discovery. What we do suggest, as many federal and state courts have held, is that such restraints must (1) be based on findings of fact that support their necessity; (2) be limited to discovery material, and not extended to publication on subjects in general; and (3) not impose on a newspaper the burden of trying to overcome a presumption that it has violated a court order. When clear findings of fact support an order, courts are not without appropriate remedies. The remedy here, however, was the wrong one. It was not based upon any fact-findings and was by any reasonable standard overbroad and inappropriate. This Court has "admonished trial courts to employ their usually considerable discretion to search for other alternatives than prior restraints." *KPNX Broadcasting Co.* v. *Arizona Superior Court*, 103 S. Ct. 584, 587 (1982) (Rehnquist, J., in chambers). An admonition is in order once more.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, the writ should be granted and the judgment vacated.

Respectfully submitted,

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